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No. 90-_____

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In the Supreme Court of the United States

October Term, 1989

INNOTRON DIAGNOSTICS,

Petitioner,

v.

ABBOTT LABORATORIES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Ninth Circuit's unpublished decision sweeps away three fundamental questions of critical importance to the administration of the antitrust laws.

Where, in moving for summary judgment, defendant does not contest that it has monopoly power in both (1) the therapeutic drug monitoring instrument market *and* (2) the therapeutic drug monitoring reagent market and where it is undisputed that the overwhelming majority of the users of defendant's instrument choose a plan under which they get the instrument "free" on the express written condition that they purchase *all* reagents from defendant (at inflated prices):

1. Is summary judgment even conceivably appropriate as to the claim under § 2 of the Sherman Act where, as here, monopoly is assumed and the conduct has made competition in the reagent market all but impossible, merely because the "tying" conduct may not be a per se § 1 violation?

The Third Circuit[1] and the Seventh Circuit[2] have ruled that the failure to establish that a tie-in arrangement violates Section 1 of the Sherman Act does not preclude proof that the conduct violates § 2 of the Sherman Act.

2. Assuming that defendant's offer to sell the instrument vitiates application of the per se rule, is the district court nonetheless obligated, before rendering summary judgment, to consider the § 1 tying claim under the rule of reason?

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[1] *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

[2] *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir.), *cert. denied*, 439 U.S. 822 (1978).

The Tenth Circuit[3] has recently ruled that before summary judgment can be granted in a tying case, the trial court must consider the case under the rule of reason; the fact that the tying arrangement passes scrutiny for some technical reason under the per se analysis does not automatically mean it will survive under the rule of reason.

3. Is summary judgment conceivably appropriate and is the jury system, as we know it, threatened, where a Court of Appeals admits there is evidence to support a reasonable inference of "forcing" but where it affirms summary judgment because it finds competing inferences more persuasive?

The Eleventh Circuit has clearly stated that on summary judgment a court cannot choose between reasonable, competing inferences. *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1532 (11th Cir. 1987).

The Ninth Circuit is in conflict with the analyses of other circuits on these important antitrust and procedural issues. Accordingly, review is appropriate.

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[3]*Monument Builders of Greater Kansas City, Inc. v. American Cemetery Association*, 891 F.2d 1473 (10th Cir. 1989).

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INNOTRON DIAGNOSTICS,

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ABBOTT LABORATORIES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner INNOTRON DIAGNOSTICS ("INNOTRON")[4] respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Ninth Circuit filed on December 15, 1989.

OPINIONS BELOW

The opinion of the Ninth Circuit is unpublished and appears as Appendix A to this Petition. The District Court's unreported ruling granting summary judgment against plaintiff's Sherman Act §§ 1 and 2 claims appears as Appendix B to this Petition.

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[4]Pursuant to Rule 28.1, Innotron certifies that Innotron does not have parent companies, subsidiaries that are not wholly owned, or affiliates.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit entered its judgment (attached hereto as Appendix C) in this case on December 15, 1989. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal....

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States . . . shall be deemed guilty. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

STATEMENT OF THE CASE

A. Statement Of Facts

The Ninth Circuit's pithy unpublished memorandum decision not only fails to provide guidance in an important

aspect of antitrust in an ever-increasing technological economy, *i.e.*, whether the components of a "system" may be sold together as a package with antitrust impunity, but also elevates to a new level of acceptability the epidemic use of summary judgment where it *admits* that plaintiff has credible evidence to support reasonable inferences.

1. Overview of the Industry.

Therapeutic drug monitoring ("TDM") tests measure the level of a prescribed drug in a patient's blood sample. Because individual patients absorb and metabolize prescribed drugs at different rates, TDM tests enable physicians to prescribe the optimum dosage for each patient.

For purposes of its summary judgment motion, Abbott conceded that it had monopoly power in the separate markets for TDM instruments and TDM reagents[5] used for immunodiagnostic TDM tests.

The Abbott Diagnostics Division ("ADD") began marketing its TDx instrument and reagents in the fall of 1981. The TDx represented a breakthrough in technology and was the first commercial instrument to conduct TDM tests using an immunodiagnostic method known as florescence polarization immunoassay ("FPIA"). The speed, ease of use and accuracy of the TDx provided unique benefits to the user and Abbott quickly became the dominant firm in that market.

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[5]Reagents are consumables that are used with each TDM test.

Abbott is also, by far, the dominant competitor in the related TDM reagent market, with market share over twice that of its next largest competitor. Abbott sells its TDM reagents at premium prices and makes supracompetitive profits.[6]

Innotron recognized the competitive potential in marketing its own line of TDM reagents for use with the TDx. Innotron entered the market in mid-1984 as a low cost, quality reagent supplier for the increasing number of TDx users. Two years later, Innotron was forced into bankruptcy.

2. Abbott Gave Its TDx to Users "Free" with Express Prohibition Against Use of Competitive Reagents.

Abbott introduced its reagent agreement plan ("RAP") in early 1982. At this time Abbott had no TDx reagent competitors. Under the RAP, Abbott placed the TDx in the laboratory without a separately stated charge for the instrument. The customer paid for use of the TDx, including service and training, by purchasing either a specified minimum quantity or minimum dollar amount of reagent kits per month at inflated prices. Moreover, Abbott charged RAP customers inflated prices on *all* reagent purchases, even those above the contractual minimum.

Originally, the RAP contract obligated the customer to buy from Abbott only the specified minimum. In late 1982, however, Abbott learned that a competitor was developing reagents for use with the TDx. Recognizing that reagent competition would threaten Abbott's ability to maintain its high prices and market share, Abbott decided in late 1982 to

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[6]In a related case brought by Hybritech Incorporated and tried in the Central District of California in early 1988, a jury, in finding for Abbott on the basis of conduct quite different from that alleged here, determined that therapeutic drug monitoring reagents constituted a relevant market and that Abbott had monopoly power in that market.

revise its RAP contract to prohibit RAP customers from using any competitive reagents. Notes from that meeting demonstrate that Abbott's *sole* objective in prohibiting RAP customers from using competitive reagents was to insulate its reagents from "the impact of the threat of pricing."[7]

Although this first competitively incited contract change requires purchase of only "Abbott approved" reagents for use on the TDx, Abbott concedes that this new contract was intended to force RAP customers to buy *all* TDx reagents from Abbott and that it had no intention of ever approving any other manufacturers' reagents. Nor did it.

Later, Abbott, determined to stymie emerging reagent competition, rewrote the RAP contract to provide unqualifiedly that "only Abbott reagents" may be used.

3. Abbott Deliberately Manipulated the Price of Its TDx to Discourage Instrument Purchase and to Promote the RAP Approach.

For the RAP program to eliminate competition and produce supracompetitive profits, Abbott needed to reduce the outright purchases of the TDx. To accomplish this objective, Abbott drastically altered both the purchase price of the TDx and the basis on which RAP was made available. Abbott discouraged purchase of the TDx by making it far more expensive. There is direct evidence that Abbott *intentionally* increased the TDx sale price to reduce TDx purchases. Within fourteen (14) months *after* competition emerged in mid-1984, Abbott raised the TDx price 40%,

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[7] Even the district court rejected Abbott's proffered quality control defense, noting that "Abbott has presented no contemporaneous evidence that it restricted its RAP customers for quality control purposes. . . ." (App. B at 14.)

even though in this very period, the standard manufacturing cost for the TDx actually declined to about $4000.[8]

Simultaneously, Abbott encouraged RAP placements by establishing considerably lower minimum reagent purchase requirements than it had originally imposed. Before reagent competition emerged, a RAP customer was obligated to buy twelve (12) reagent kits each month at a cost of $3600. But in 1984-1985, Abbott actively promoted a variety of RAP programs that required only a one or two kit per month minimum. The RAP customer could then obtain a TDx, a minimum quantity of reagents, and service and training for as little as $650-760 per month. At this point, purchase clearly became uneconomic.

Both the district court and the Ninth Circuit recognized that the evidence supported an inference that "Abbott had the conscious aim of deterring separate purchase of the TDx in favor of RAP contracts." (App. B at 8.) And, the plan was a success. After July 1984 (the entry of TDx reagent competitors) through 1986, only 8% of the TDx placements were made by sale.

4. Abbott Even Prohibited Owners of the TDx from Buying Competitive Reagents.

Abbott took aggressive steps to impose on customers who had actually purchased the TDx (and were theoretically free to buy competitive reagents) an explicit contractual tie through new service contracts. The principal program that Abbott used to ensure that TDx owners did not buy competitive reagents was the Self Service Program ("SSP"). Abbott capitalized on the hospital's need to do emergency repairs by developing a new Self Service Utilization Plan ("SSUP")

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[8] By June 1984, the instrument with a standard cost of about $4000 was priced to sell at $62,450.

and a new SSP RAP contract, both of which, for the first time, contained the same express commitment that existed in RAP agreements to use only Abbott reagents. Abbott's vice president of TDx sales and marketing candidly admitted that Abbott specifically targeted the SSUP contracts at TDx owners whom it suspected of using competitive reagents. A regional sales manager elaborated that the SSUP was promoted precisely because of its contractual prohibition against use of competitive reagents.

5. Abbott's Enforcement of Its Explicit Reagent Ties.

Having achieved a tie on all RAP customers and many of the TDx owners, Abbott adopted coercive policing tactics to enforce its contracts and block out reagent competition.

Abbott confiscated Innotron reagents found in hospital laboratory refrigerators. Abbott also threatened to repossess the TDx, often on short notice, knowing that customers could not afford to be left without the ability to do TDM testing. Abbott's policy was to remove physically the TDx from customers who persisted in using Innotron reagents. As one customer described: "They came through like storm troopers." "During the middle of the run, without the test method being done yet, she pulled the plug, loaded it on a cart, and off they went with it."

In sum, Abbott's contractual tying restrictions and coercive tactics forced hospitals to forego Innotron's cost-effective reagents and to buy unwanted, higher-priced Abbott reagents. Maintaining dominance in the TDM reagent market was both the purpose and the effect of all of Abbott's marketing and policing strategies.

REASONS FOR GRANTING THE WRIT

There are three separate bases for granting the writ, each related in a direct and important way to the administration of the antitrust laws.

First, from a substantive law point of view, is the totally unwarranted holding of the Ninth Circuit (in this and three other cases) that in a case where tying is the gravamen of the antitrust claim, the mere fact that the conduct may not be per se unlawful automatically disqualifies the conduct from being unreasonably exclusionary under a § 2 Sherman Act analysis. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 179 (1988). This wooden, mechanical rule, which has been repeatedly invoked by the Ninth Circuit, is analytically unjustified. The degree of market power required for invocation of per se illegality under Section 1 and for finding monopoly power under Section 2 is not identical. Nor is the analysis used in evaluating the legality of the conduct identical. Other circuits have recognized these self-evident distinctions. *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir.), *cert. denied*, 439 U.S. 822 (1978). The Ninth Circuit's overly restrictive approach makes no sense and warrants review and repudiation. That there are now four cases in the Ninth Circuit in the past decade decided by this artificial rule demonstrates the importance of this issue.

Second, and related to the first point, is the question of whether rejection of per se tying by a district court

authorizes it to grant summary judgment without examination of the conduct under the rule of reason. Related to that question is the issue of who bears the burden, in summary judgment, of negating the existence of fact issues under a rule of reason analysis. Both the district court and the Ninth Circuit avoid this issue by ruling that petitioner did not raise the rule of reason in the district court. The blunt truth is that respondent, the moving party on the motion, did not brief or argue whether the contractual restraint passed muster under the rule of reason. Surely, it is still the burden of the moving party to assert that no justiciable controversy existed under that analysis. And quite recently, the Tenth Circuit has so ruled. *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Association*, 891 F.2d 1473, 1483 (10th Cir. 1989).

Finally, and perhaps even more important than the substantive law issues, is the propriety of summary judgment in antitrust cases where fact issues germane to the outcome are in sharp dispute. This case is a classic illustration of the lengths to which lower courts have extended this Court's three 1986 decisions redefining the scope of Fed. R. Civ. P. 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The essence of this summary judgment motion was defendant's contention that its tying arrangement–written into a contract in clear and explicit terms and vigorously enforced–was not a per se violation of Section 1 of the Sherman Act because the "tying" instrument was available for sale. There was, however, direct, cogent evidence that (1) the sale price of the instrument was purposefully manipulated to discourage sale, while simultaneously the "free" machine RAP arrangement was revised to encourage usage requiring purchase of all reagents at inflated

prices, (2) the purchase price after 1984 rendered purchase uneconomic and (3) sales of the instrument declined sharply so that after mid-1984, when TDx reagent competition was introduced, only *8%* of the instruments were purchased.

The Court of Appeals–directly contravened this Court's *Liberty Lobby* warning and proceeded to weigh, sort and credit evidence as though it were a jury. It chose to believe the defendant's version of a sharply controverted factual dispute. Moreover, each lower court totally ignored the cogent evidence that even purchasers of the instrument were forced into buying Abbott reagents by an invidious tie-in to a servicing contract. Both lower courts acknowledge that plaintiff presented evidence supporting a reasonable inference of forcing, but found that evidence "COULD" be explained by competing inferences believed to be more persuasive. (App. A at 2.) This dangerous trend of *sub silentio* repeal of the jury system should be repudiated.

We know district courts and the Courts of Appeals are laboring under an ever-increasing workload because of the Sentencing Guidelines, the minimum mandatory drug sentences and the stepped-up "drug war." There is great temptation to dispose of difficult, time-consuming antitrust cases on some technical ground in the hope that disposition will be affirmed or at least trial delayed for several years.

This syndrome has reached epidemic proportions. Virtually no antitrust case goes without a motion for summary judgment and, empirically, an increasingly dominant percentage are being granted in whole or material part. In one recorded case, the district court granted summary disposition on its own initiative without a motion or briefing.[9]

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[9] *Yamaha International Corp. v. ABC International Traders, Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,874 (C.D. Cal. 1989).

The lower courts have read the 1986 trilogy of decisions as granting a "green light" for summary judgment. And now the grant of summary judgment is running rampant. No one suggests, in this day and age, with antitrust substantive law more carefully refined and with the press of massive criminal dockets, a return to *Poller v. CBS, Inc.*, 368 U.S. 464 (1962).

There are many antitrust cases for which summary judgment is appropriate. But, this is not such a case. It is an important litigation raising legal issues of enormous precedential value in today's society. "Systems" selling versus "component" selling is a major economic issue. Much litigation has revolved around these conflicting approaches. *See, e.g., Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). This case presents an important economic/business/legal question for trial and review.

Abbott is entitled to its defense that the RAP program was not unreasonably restrictive because the TDx instrument was available for sale thus allowing purchase of competitive reagents. But it is painfully clear—as even the Court of Appeals conceded—that there are two sides to that contention. Innotron was entitled to trial on the issues of whether Abbott's "for sale" policy was or was not "forcing" and whether it was or was not unreasonably restrictive given its alleged monopoly power. But, it is unthinkable that this case could be swept away by two *unpublished* opinions on *summary judgment*.

ARGUMENT

A. CONFLICT EXISTS IN THE CIRCUITS AS TO WHETHER A MONOPOLIZATION CLAIM UNDER SECTION 2 OF THE SHERMAN ACT CAN EXIST BASED ON CONDUCT WHICH IS NOT PER SE TYING UNDER SECTION 1 OF THE SHERMAN ACT

The essence of the Court of Appeals' disposition of this case under Section 2 of the Sherman Act is that no claim of monopolization can be predicated on "tying" conduct which escapes per se condemnation under Section 1 of the Sherman Act. Several published Ninth Circuit decisions have reached the same conclusion: *Foremost*, 703 F.2d 534; *Airweld*, 742 F.2d 1184; *Mozart Co.*, 833 F.2d 1342.

However, two other circuits have reached the opposite conclusion. In *SmithKline Corp. v. Eli Lilly & Co.*, District Judge Higginbotham specifically ruled that the defendant's evasion of per se tying because, as here, the products could be purchased separately and hence there was no coercion, did not foreclose a claim under § 2 for monopolization. 427 F. Supp. at 1121. In affirming the judgment for the plaintiff, the Third Circuit specifically endorsed this aspect of the district judge's conclusion: "Although sufficient to establish the offense of monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2, Lilly's marketing scheme lacks the element of coercion necessary for liability under the theory of tie-ins." 575 F.2d at 1061 n.3.

The Seventh Circuit has adopted the same analytical approach.

> Because the essential element of agreement or understanding is missing, Sargent-Welch has failed

> to establish a violation of § 1 of the Sherman Act or § 3 of the Clayton Act.

Sargent-Welch, 567 F.2d at 709.

And then immediately following that conclusion, the court notes:

> The findings [tying] just referred to do not dispose of the contention that Cahn [defendant] violated § 2 of the Sherman Act by unilaterally using monopoly power in microbalances to force unwanted millibalances on its dealers. . . .

Id.

These two decisions are in sharp contrast with the wooden approach of the Ninth Circuit:

> Airweld's failure to prove a substantive tying violation *precludes* it from claiming that Airco's actions in that respect also constituted an attempt to monopolize.

Airweld, 742 F.2d at 1191 n.3 (emphasis added); *see Foremost*, 703 F.2d at 543. Again, in *Mozart Co.*, the Ninth Circuit mechanically holds that "Mozart's failure to prove its tying claim *precludes* it from asserting an attempt to monopolize claim arising out of the same conduct." 833 F.2d at 1352 (emphasis added). The unpublished opinion in this case, citing only to *Foremost*, reaches the same conclusion using the same incantation without analysis or discussion.

This important issue of substantive antitrust law as to which there is a split in the circuits should be reviewed by this Court.

B. THE FAILURE OF THE COURT OF APPEALS AND THE DISTRICT COURT TO CONSIDER THE RULE OF REASON WARRANTS REVIEW

Another, albeit less significant, issue is presented by the refusal of the district court and the Court of Appeals to consider whether the tying arrangement, assuming it did not qualify for per se treatment, could violate Section 1 of the Sherman Act under a rule of reason analysis. Both lower courts shifted that burden to plaintiff even though the moving papers for summary judgment did not mention the rule of reason.

It is elementary that the party moving for summary judgment bears the burden of presenting evidence negating a justiciable factual issue on any legal theory applicable to plaintiff's case.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

Justice White's concurring opinion points out that "[i]t is the defendant's task to negate, if he can, the claimed basis for the suit." *Id.* at 328.

The failure of the lower courts here to examine the case under a rule of reason analysis is directly contrary to a recent holding of the Tenth Circuit. That Circuit held that it is the obligation of the trial court to ensure that there is no basis

whatsoever for the plaintiff's suit before proceeding to summary dismissal. *Monument Builders*, 891 F.2d at 1483 n.11.

C. THIS COURT SHOULD EMPHASIZE THAT SUMMARY JUDGMENT IS INAPPROPRIATE WHERE THERE IS A CHOICE BETWEEN REASONABLE COMPETING INFERENCES

Summary judgment is now the rule in antitrust cases. Survival for trial has become the exception. This Court cannot possibly review all of the antitrust cases terminated summarily. The Courts of Appeals must scrutinize the grant of summary judgment to ensure that this Court's mandate, as set forth in *Anderson v. Liberty Lobby*, is applied by district judges. In that case, this Court cautioned, despite the temptation to do otherwise, that the trial judge "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249.

According to this Court,

> [t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Id. at 250. The decision below ignores this authority.

Even the Ninth Circuit's Memorandum admits that summary judgment was inappropriate:

> Innotron produced seven pieces of evidence to support its claim: (1) increased TDx sale price; (2)

> fall of TDx placements to 8%; (3) Dr. Griffin's testimony; (4) the service plans; (5) the hospital buyers' testimony; (6) Abbott pricing of the RAP option to deter TDx purchase; and (7) Abbott's enforcement of its RAP contracts.
>
> Of this evidence, only inferences from two pieces of evidence (the TDx price increase and the TDx decline as a percentage of new placements) support Innotron's position at all. However, these two pieces of evidence are susceptible [sic] to other inferences besides coercion. For example, each TDx price increase was accompanied by new improvements. Therefore, a possible inference is that Abbott tied its price increases to improvements. Even without improvements, price increases are not necessarily evidence of coercion. Price increases *could* be a legitimate attempt to maximize profits in the tying product market.
>
> *See* [*Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)] ("When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised."). And the decline in placements *could* have reflected saturation in the large hospital market.

(App. A at 2 (emphasis added).)

Indeed, all of the evidence submitted by Innotron supported its position. But assuming, *arguendo*, that only two of the "pieces" support the inference of coercion, neither the district court nor the Court of Appeals has the option of then

deciding that merely because there are other inferences which could be drawn, summary judgment is appropriate. Once this Court sanctions–particularly by an unpublished opinion–the weighing of competing inferences as an appropriate standard for summary judgment, then it will have authorized abolition of the jury system.

It is inconceivable that the Ninth Circuit should be allowed to affirm summary judgment by writing that Innotron's evidence on pricing "*could* be a legitimate attempt to maximize profits" and that "decline in placements *could* have reflected saturation in the large hospital market." *Id.* (emphasis added). Certainly, those explanations *COULD* exist. When a court is forced to SPECULATE what COULD have been, summary judgment is forbidden.

Indeed, it is axiomatic that on summary judgment the nonmoving party is entitled to any inference which is reasonable.

> [A] court must deny summary judgment if reasonable minds could differ as to the factual inferences to be drawn from the undisputed facts.

Helicopter Support Systems, 818 F.2d at 1523. The Court of Appeals here admits our inferences are reasonable. They just found other inferences *COULD* be equally plausible. A decision such as this which implicitly repudiates the jury system should be summarily vacated.

CONCLUSION

On two substantive issues of antitrust law, namely whether a § 2 claim can be maintained by "tying" conduct which, for one reason or another does not constitute a per se tying claim under § 1, and whether a court, before granting summary judgment, must examine whether the tying conduct is offensive under a rule of reason analysis, the

decision below is in conflict with other circuits and review is appropriate. More flagrant is the affirming of summary judgment where there are admittedly reasonable, competing inferences. The decision below ignores this Court's admonition on the standards for granting summary judgment. Clarification and emphasis of this procedural issue is vital to the continuing well-being of the jury system and the enforcement of the antitrust laws.

Dated: March 15, 1990

Respectfully submitted,

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APPENDIX

FILED

DEC 15 1989

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOTRON DIAGNOSTICS, Plaintiff-Appellant, vs. ABBOTT LABORATORIES, Defendant-Appellee.	)	NO. 88-6511 D.C. # CV-85-2207-WJR MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted October 3, 1989
San Francisco, California

Before: TANG, HALL, and BRUNETTI, Circuit Judges.

Innotron Diagnostics ("Innotron") appeals the district court's partial summary judgment dismissal of its Sherman Act antitrust claims against Abbott Laboratories ("Abbott"). We affirm.

DISCUSSION

1. Sherman Act Section 1 Claim

Innotron asserts that the district court erred when it dismissed the Sherman Act Section 1 claim. We disagree.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit R. 36-3.

We conclude that Innotron has failed to produce enough evidence to create a genuine issue of material fact; that is, enough evidence to allow a reasonable jury to find in its favor on whether Abbott forced buyers of its TDx to purchase its reagents. See Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) (tying involves forcing a buyer's purchase of a tied product).

Innotron produced seven pieces of evidence to support its claim: (1) increased TDx sale price; (2) fall of TDx placements to 8%; (3) Dr. Griffin's testimony; (4) the service plans; (5) the hospital buyers' testimony; (6) Abbott pricing of the RAP option to deter TDx purchase; and (7) Abbott's enforcement of its RAP contracts.

Of this evidence, only inferences from two pieces of evidence (the TDx price increase and the TDx decline as a percentage of new placements) support Innotron's position at all. However, these two pieces of evidence are suspectible to other inferences besides coercion. For example, each TDx price increase was accompanied by new improvements. Therefore, a possible inference is that Abbott tied its price increases to improvements. Even without improvements, price increases are not necessarily evidence of coercion. Price increases could be a legitimate attempt to maximize profits in the tying product market. See id. at 14 ("When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised."). And the decline in placements could have reflected saturation in the large hospital market.

There is no other evidence that Abbott coerced buyers into purchasing both its TDx and its reagents. Griffin's testimony is not relevant. Griffin's analysis never touches on whether a buyer had to take Abbott's reagents over

Innotron's reagents due to a tie. This is the relevant inquiry because if a buyer could purchase an Abbott TDx and still save money by purchasing Innotron reagents, then the essence of tying—forcing a buyer to take an undesired tied item—does not exist. See id. at 12. Griffin's testimony merely indicates that Abbott made the RAP package more attractive than the separate purchase of Abbott's TDx and Abbott's reagents. But a seller's decision to offer a package sale is not necessarily evidence of coercion. See Robert's Waikiki U-Drive v. Budget Rent-A-Car, 732 F.2d 1403, 1407 (9th Cir. 1984).

Abbott's service plan also fails to support Innotron's tying claim. For the service plans to constitute evidence of tying, Innotron would not only have to show that TDx purchasers needed to have a service plan but also that only the service plan with the reagents constituted the economical option. Innotron failed to offer evidence on either point.

Nor can Innotron rely on the hospital buyers' testimony as evidence in its favor. The hospital buyers who testified that they wanted to use Innotron's reagents instead of Abbott's had already signed RAP contracts that prevented their using competing reagents. Innotron failed to offer any evidence that Abbott forced an uncommitted hospital buyer to sign a RAP instead of purchasing Abbott's TDx and using competing reagents.

Furthermore, Innotron cannot point to the fact that Abbott priced the RAP option to deter TDx purchase as proof of its tying allegation. Making a package sale attractive is not evidence of coercion so long as the buyer freely can purchase either item separately. See id. Here, Innotron has produced no evidence that a buyer could not economically purchase either item (the TDx or the reagents) separately. Thus, the fact that Abbott more attractively priced the RAP option is not evidence of coercion.

Lastly, the fact that Abbott rigorously enforced the already signed RAP contract does not bear on whether Abbott forced buyers to sign a RAP.

In sum, then, for a jury to find in Innotron's favor, it would have to draw inferences from the price increase and the placement decline which are unreasonable given the lack of supporting evidence.[1]

2. Sherman Act Section 2 Claim

Innotron asserts that the district court erred when it dismissed the Sherman Act Section 2 claim. We disagree.

We reject Innotron's claim because the conduct that Innotron relies on to satisfy the unreasonable restriction of competition element of a monopolization claim or the anticompetitive element of an attempted monopolization claim is precisely the same conduct that Innotron relied on in its tying claim. See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 543 (9th Cir. 1983) ("Because the conduct Foremost alleged in support of its section 1 tying claim is not anticompetitive, it is of no assistance to Foremost's efforts to state a claim for monopolization or

[1]We do not address Innotron's challenge to Abbott's lawyers' analysis about price savings because that analysis does not bear on the sufficiency of Innotron's evidence.

attempted monopolization . . ."), cert. denied, 465 U.S. 1038 (1984). Nowhere in its opening or reply brief does Innotron highlight conduct separate and distinct from its tying claim to support its Section 2 claim.

AFFIRMED.[2]

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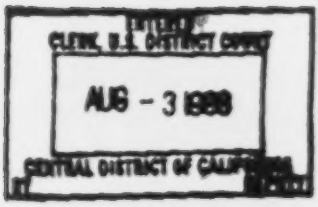
[2]We refuse to decide whether Innotron has offered enough evidence on its rule of reason claim to defeat summary judgment because Innotron failed to raise this issue below. See Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1477 (9th Cir. 1989) (as a general rule this court will not consider issues raised for the first time on appeal).

We also conclude that Innotron failed to raise the leverage monopolization issue below. Therefore, we also decline to address this issue.

In its reply brief, Innotron alleges that it raised this issue below because "the district court expressly held that Innotron had not proven leverage conduct violative of § 2." We reject this allegation for several reasons. First, all the district court did was use the term "economic leverage" and state that "monopoly power was leveraged" while discussing why a case was not applicable. The district court never expressly held that Innotron had failed on its monopoly leverage theory. Memorandum Opinion at 14-15. Second, the case the district court was distinguishing, SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3rd Cir.), cert. denied, 439 U.S. 838 (1978), never discussed the monopoly leverage theory as a separate basis for liability under Section 2. The SmithKline court decided the case on the basis of a monopolization theory. Id. at 1062. Indeed, the SmithKline case was decided before the landmark Second Circuit case, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), that outlined the monopoly leverage theory as a separate basis for liability. Finally, Innotron's first amended complaint, the latest complaint according to the excerpt of record, mentions monopolization and attempted monopolization but does not refer to the monopoly leverage theory.



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INNOTRON DIAGNOSTICS, Plaintiff, vs. ABBOTT LABORATORIES, Defendant.	CV 85-2207 WJR ORDER ON MOTION FOR SUMMARY JUDGMENT; FINDINGS OF FACT AND CONCLUSIONS OF LAW THEREON
ABBOTT LABORATORIES, Plaintiff, vs. INNOTRON DIAGNOSTICS, Defendant.	CV 85-2614 WJR

This matter comes before the Court on defendant's motion for summary judgment and plaintiff's motion for partial summary judgment. The Court having considered the papers filed in support thereof and in opposition thereto and having heard oral argument.

IT IS HEREBY ORDERED that defendant's motion is GRANTED in part and DENIED in part. The Court declines to rule on plaintiff's motion.

The Court finds as follows:

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY F.R.C.P. RULE 77(d).

FACTS

Plaintiff, Innotron Diagnostics ("Innotron"), brings this action against Abbott Laboratories ("Abbott") for alleged violations of the Sherman Act in connection with the sale of therapeutic drug monitoring ("TDM") tests. Innotron alleges that Abbott has forced customers to buy Abbott-manufactured tests, or "reagents," as a condition to acquiring the instrument which analyzes them, Abbott's "TDx." It also alleges that Abbott violated Section 2 of the Sherman Act by prosecuting a patent infringement action against Innotron in bad faith.

Abbott introduced the TDx in Fall, 1981. This instrument, in conjunction with the TDM tests it is designed to analyze, measures drug levels in a patient's bloodstream by introducing fluorescent compounds to a blood sample, and measuring the polarization of light emitted by the compounds. The TDx system has been a commercial success, and it is undisputed that the TDx and Abbott TDM tests occupy leading positions in their fields.

Innotron was founded in the United Kingdom in 1976, and later incorporated in California in 1982. It was initially engaged in the development and marketing of an instrument called the "Gamma Counter." This instrument analyzed TDM tests which utilized radioactive materials. As this process became displaced by "fluorescent polarization" technology, Innotron began developing TDM tests for use with Abbott's TDx. It began distributing four such products in Fall, 1984. Innotron reagents were selling at an annualized rate of $1 million by August, 1985, although annual sales for the year amounted to only $500,000. The company filed for bankruptcy in Fall, 1986, retaining this lawsuit as its only asset.

Abbott offers customers three means of obtaining a TDx analyzer: (1) outright purchase; (2) lease through a third party; or (3) under a reagent agreement plan ("RAP"). A purchaser makes a lump sum payment or several installment payments and receives title to the instrument. Purchasers and lessees may purchase Abbott reagents at lower, non-RAP prices, and have no obligation to purchase Abbott reagents at all. Under the RAP option, the customer pays nothing for the instrument, but is obligated to buy Abbott reagents at premium prices.

Abbott's RAP contracts at first required only a minimum purchase of Abbott TDM tests, beyond which a customer could use competitors' reagents. In 1982, however, Abbott amended the RAP contracts to require RAP customers to use only "Abbott-approved" reagents on the TDx. No non-Abbott reagents were ever approved, and Innotron's request for approval was summarily rejected in July, 1984. Abbott subsequently rewrote the RAP contract to make explicit that use of non-Abbott reagents would be grounds for termination of the contract. There is ample evidence that Abbott actively enforced this provision. Hence it is undisputed that TDx placements under RAP contracts are "tied" to Abbott reagents.

As of January 1, 1984, 34.2% of all TDx placements were by sale or lease. As of January 1, 1985, this percentage had declined to 23.1%. Only 8% of TDx placements after June, 1984, were by outright purchase. This decline occurred despite an incentive program sponsored by Abbott in Fall, 1984, to promote purchase of the TDx. Abbott attributes the decline to market saturation among those customers who could justify the capital investment in a TDx and other independent market factors, including customer concerns with technological obsolescence and increasing capital constraints. Innotron

attributes the decline to conscious manipulation of the TDx purchase price and liberalization of RAP requirements in connection with Innotron's competitive entry in 1984. The changes were allegedly designed to secure Abbott's reagent business by making RAP subscription more attractive than the sale or lease options.

When introduced in 1981, the TDx sold for an introductory price of $32,000. Between that time and June, 1984, Abbott increased the price to $44,750. In July, 1984, the price was raised to $49,750 and in September, 1985, to $62,450, where it has remained. Abbott does not contest Innotron's assertion that the cost of manufacture actually decreased during this period.

Initially, Abbott required a customer to purchase 12 "kits" of reagents per month to qualify for placement of a TDx under a RAP contract. At $300 per kit, this constituted a $43,000 annual commitment. In 1984-85, however, Abbott had promotions which reduced the minimum requirements to 1-2 kits per month, which Innotron calculates represented a $4440-$8880 annual commitment.

TDx purchasers receive a three month warranty on the instrument. Beyond this, Abbott offers three basic service plans: (1) a 'time and materials' plan, with payment based on actual labor and parts needed; (2) an annual service contract, covering on-site service, parts and labor; and (3) a self-service plan ("SSP"), under which Abbott supplies replacement parts and instructions. The SSP is available to either TDx owners or RAP customers.

Innotron has introduced evidence that SSP service contracts are desirable because they enable a customer to repair its instrument without having to wait for an Abbott service technician. The SSP may be purchased separately by TDx owners and RAP customers for a cost of $18,500 over four years. It is also available free of surcharge to TDx

customers who: (1) are high volume users ($25,000/year or greater); and (2) commit to purchase 100% of two specific TDM tests and 90% of their overall test volume from Abbott. 86% of SSP subscribers choose the latter option.

Innotron filed this action on April 1, 1985. Three weeks later Abbott filed a patent infringement action against Innotron. The patent sued upon relates to the use of a compound in the TDM reagents which operates to reduce two potential sources of inaccurate measurements. Innotron has challenged the patent in proceedings before the Patent and Trademark Office ("PTO") and has won a preliminary ruling that the patent was anticipated by prior art—specifically, an article written by Kobayashi, et al.—and is therefore invalid.

Alleging that the patent was fraudulently procured or known to be invalid at the time the patent action was instituted, Innotron amended its complaint to include a Section 2 claim for abuse of the patent process. Abbott now moves for summary judgment on each of Innotron's claims.

CONCLUSIONS OF LAW

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Cartrett, 477 U.S. 317, 106 S.Ct. 2548, 2550, 91 L.Ed.2d 265 (1986).

To establish a per se illegal tying arrangement under Section 1 of the Sherman Act, a plaintiff must establish:

(1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; (3)

an effect on a not-insubstantial volume of commerce in the tied product market.

Roberts' Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., 732 F.2d 1403, 1407 (9th Cir. 1984).

Where the products in question are genuinely available on a separate basis, the first element is not satisfied. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S.Ct 1551, 1558 (1984); Northern Pacific Rv. Co. v. United States, 356 U.S. 1, 6 n.4, 78 S.Ct. 514, 418 and n.4 (1958); Roberts, 732 F.2d at 1407. It is undisputed that Abbott offers the TDx without the condition that Abbott reagents be purchased with it.

Separate availability does not preclude antitrust liability where a tying arrangement is nonetheless coerced through pricing policies or other means. See In Re Data General Corp. Antitrust Litigation, 490 F. Supp. 1089, 1111 (N.D. Cal. 1980); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970). However, the price of the two products sold separately need not be identical to their packaged price. See Roberts, supra, (fly-drive packages do not constitute tying despite price advantages over separate car rental). Abbott must have "established its pricing policy in such a way that the only viable economic option is to purchase the tying and tied products in a single package." Ways & Means, Inc. v. IVAC Corp., 546 F. Supp. 697, 701 (N.D. Cal. 1979), aff'd per curiam, 638 F.2d 143 (9th Cir.), cert. denied, 454 U.S. 895 (1981) ("IVAC").

In IVAC, Judge William Orrick of the Northern District of California ruled that, in the absence of evidence coercive marketing tactics, a showing that 25% of defendant's sales of the tying product were made independently from the tied package removed any question as to separate availability.

This conclusion was supported by statistics demonstrating that separate purchase was a viable option. Id. at 702-03.

Innotron has failed to meet its burden of introducing substantial evidence that a tying arrangement was coerced by either price differentials or other marketing tactics. It first argues that Abbott manipulated the purchase price of the TDx and the RAP plan qualifications so as to render separate purchase "distinctly uneconomic." Innotron offers evidence that Abbott's director of marketing queried in a memorandum "whether we should price ourselves out of the instrument sale market," and was overheard to say that the TDx price increases were intended to discourage TDx purchases. It then points to the price increases and RAP program expansion as proof that Abbott acted upon that intent to discourage TDx purchase and promote the RAP options in order to secure reagent business.

A study prepared by David Griffin, an expert witness on the TDM industry, purports to illustrate how Abbott's manipulation made separate purchase an "uneconomic proposition." The study assumes that customers view a five year payback period on investments in diagnostic instruments as reasonable. It then calculates that a minimum RAP qualifier in 1982, when the minimum purchase obligation was 12 kits per month, who instead purchased the TDx, would recoup its investment in approximately five years by virtue of Abbott's lower, non-RAP reagent prices. This calculus changed after the TDx price increases and the expansion of the RAP program in 1984. A minimum RAP qualifier in 1984, when the minimum purchase obligation was only 1 kit per month, would not recoup its investment for 78 years.

The evidence introduced by Innotron would be sufficient to support an inference that Abbott had the conscious aim of deterring separate purchase of the TDx in favor of RAP

contracts. But Abbott's intent in this regard is not determinative. It appears to the Court that Abbott was entitled to adjust its prices as it pleased, so long as separate purchase of the TDx on an untied basis continued to be a viable option. To hold otherwise would preclude Abbott from adjusting its prices so as to derive the optimal level of profits from both the purchase and RAP options.

Setting aside the evidence on intent, the only evidence offered by Innotron which appears to be directed toward the price differential issue is that contained in the Griffin study. This study, however, fails to raise a genuine issue of material fact. Simple logic dictates that to demonstrate that Abbott's changes made separate purchase an "uneconomic proposition," the study should compare the economics of the separate purchase and RAP options before and after the changes in question, from the perspective of the same customer. Further, the reagent prices used to evaluate the feasibility of separate purchase of the TDx should be Innotron reagent prices, not Abbott non-RAP reagent prices. These basic assumptions underlie the comparison utilized in IVAC, a case discussed extensively by both parties. See IVAC, 506 F. Supp. at 702 n.9.

The Griffin study is deficient in both these respects. First, Innotron's use of Abbott non-RAP reagent prices rather than its own prices leaves to conjecture the actual savings that would accrue to a TDx purchaser. Furthermore, the comparison between minimum RAP qualifiers in different years is immaterial. That a minimum RAP qualifier in 1985 would not recoup its investment for 78 years is meaningless where the same analysis shows convincingly that such a customer could not justify purchasing a TDx even at its original price. This analysis tends to prove only that Abbott's expansion of the RAP

program made the TDx available to customers for whom outright purchase was never a viable option.

Because of these deficiencies, the Griffin study offers the Court no reasonable basis for inferring that any appreciable number of TDx customers for whom separate purchase might have been a viable option before the changes, were thereafter effectively limited to the RAP option. Though Innotron points to the post-1984 decline in the percentage of TDx customers opting for outright purchase, it has not adduced substantial evidence, through statistics or otherwise, linking any significant part of the decline to Abbott's price increases. If anything, its evidence lends support to Abbott's contention that the decline was due to market saturation among larger customers and a shift in focus to smaller customers for whom acquisition of a TDx would not otherwise be feasible.

The Court therefore finds that Innotron has failed to meet its burden of offering substantial evidence that Abbott coerced a tying arrangement through price differentials. The record indicates that 23.1% of the TDx's in the field are purchased or leased and thus not under RAP reagent contracts. And Innotron has not raised any genuine issues of fact concerning the continued viability of the separate purchase option. This finding is therefore not dependent upon the statistics submitted by Abbott in response to the Griffin study. These statistics, compiled in accordance with the methodology employed in IVAC, tend to show that separate purchase of the TDx, combined with purchase of Innotron reagents, was clearly viable for most TDx customers both before and after Abbott's price increases. Because they are not determinative, the Court declines Innotron's proffer of evidence regarding their accuracy. See IVAC, 638 F.2d at 143 (challenge to statistics on appeal rejected on similar grounds). The Court also denies

Innotron's request to file a supplemental brief on the price differential issue. Innotron burden on this issue was patently clear before it filed its initial memorandum in opposition to the instant motion.

Innotron's allegations of coercive marketing tactics are similarly unsupported by substantial evidence. Its most serious allegations, perhaps, are that Abbott offered the purchase option only selectively and did not discuss the option with customers. There is no evidence in the record, however, of such refusals to deal. The referenced deposition testimony contains only one customer's testimony that he could not recall whether the purchase option was discussed. In contrast, the record is replete with testimony from other customers that Abbott did in fact offer and discuss the purchase option.

Innotron also alleges that Abbott did not fully divulge RAP contract details, namely the Abbott-only reagent provision, before placing the TDx under RAP contracts. This is supported by the deposition testimony of two customers, but is insignificant, inasmuch as the arrangement could be terminated on 90 days notice by either party.

The third allegation is that Abbott intentionally undercut its Fall, 1984, TDx purchase promotion, because it was reluctant to lose the control over reagent business that it gains with RAP placements. This assertion is totally unsupported by the referenced exhibit. Abbott's militant enforcement of the RAP contracts is also heavily emphasized, but is irrelevant to the issue of whether a tying scheme existed. Finally, even if these allegations were supported, they do not rise to the level from which coercion could reasonably be inferred. Compare Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

The third strand of Innotron's original attack on Abbott's separate availability argument concerns the alleged use of SSP service contracts to tie even TDx owners to Abbott reagents. As noted, the SSP may be acquired by purchase or by high volume customers who agree to purchase primarily Abbott reagents. However, Innotron's evidence attests to no more than the desirability of the SSP package. It has presented no evidence that customers actually need to acquire the SSP, no evidence on what percentage of TDx owners actually acquire the SSP, and no evidence suggesting that Abbott's other service programs are not a viable alternative. Finally, it has presented no evidence that separate purchase of the SSP itself is not a viable option. These defects plague Innotron's analysis whether it views the SSP as an independent tying product, as the heading in its brief indicates, or simply as an additional disincentive to separate purchase of the TDx. Abbott's marketing of the SSP therefore does not present any questions of fact precluding summary judgment.

In view of the lack of evidence supporting inferences of coercion through price differentials, marketing tactics or service programs, the Court finds that no issues of material fact exist concerning the genuine availability of the TDx on a non-tied basis. Summary judgment is therefore appropriate. The genuine availability of the separate purchase option is reflected by the significant percentage of TDx instruments which have been purchased or leased, a fact which renders this case factually distinct from each case in which separate availability has been found lacking. Compare Advance Business Systems, supra; In Re Data General Antitrust Litigation, supra.

In a brief "supplemental" memorandum filed two court days before the hearing on this motion and at the hearing itself, Innotron contended that the facts of this case render

the entire separate availability analysis extraneous. Citing Betaseed, Inc. v. U and I, Inc., 681 F.2d 1203, 1222 (9th Cir. 1982), Innotron begins with the proposition that the coercion underlying a tie-in (1) may be shown through evidence of "actual" coercion; or (2) may be inferred from the totality of the circumstances. Innotron then argues that only in the latter situation does the separate availability of the tying product become relevant. Under this analysis, IVAC and other separate availability cases become "inference" cases where, in lieu of evidence of "actual" coercion, plaintiffs attempted to infer coercion from pricing policies or marketing tactics. The instant case stands in contrast, according to Innotron, because the express tying clauses in the RAP contracts, inter alia, constitute evidence of actual coercion. Whether or not the TDx was available separately from Abbott reagents is thus said to be irrelevant.

Common sense teaches that the choice of a package contract over separate purchases is not "coerced" where each was a viable option. The law is not inconsistent with this proposition. Innotron's argument deviates from the law by calling the very existence of such a contract evidence of "actual coercion." Nothing in Betaseed supports such a categorization. In fact, Betaseed draws a distinction between "actual coercion" and "coercion [which] may be implied from a showing that an appreciable number of buyers have accepted burdensome terms, such as a tie-in, and there exists sufficient economic power in the tying product market." Id. (emphasis added). This case, along with IVAC and other separate availability cases, fits into the latter category. Whether the relevant products are sold separately is therefore relevant, and the Court finds nothing in this eleventh-hour argument to alter its conclusion that summary judgment against the tying claim is appropriate.

Abbott contends that this conclusion is also supported by the existence of a legitimate business justification. See Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1348-49 (9th Cir. 1987). Inasmuch as Abbott has presented no contemporaneous evidence that it restricted its RAP customers for quality control purposes, the Court finds that questions of fact exist concerning whether any tying arrangement was in fact implemented for legitimate purposes. See Advance Business Systems, supra (goodwill justification rejected on appeal due to lower court finding that tie implemented to secure business).

Tying allegations insufficient to support liability under Section 1 of the Sherman Act may not form the basis of a Section 2 claim. Foremost Pro Color v. Eastman Kodak Co., 703 F.2d 534, 543 (9th Cir. 1983), cert. denied, 104 S.Ct. 1315 (1984). Because Innotron's Section 2 claim rests upon the same alleged coercive conduct as its Section 1 claim, summary judgment is granted against Innotron's Section 2 tying claim.

SmithKline Corp. v. Eli Lilly & Co. 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838 (1978), is not binding authority and is in any event not inconsistent with this holding. The bundled pricing program at issue in SmithKline did not leverage economic power to bind customers to particular products and so did not present a coercion problem under Section 1. Monopoly power was leveraged, however, to provide cumulative discounts which precluded effective competition in another market. This presented an independent antitrust problem cognizable under Section 2. In this case, Innotron's allegations under both sections are confined to the use of economic power to coerce tied purchases. Such coercion having been found lacking, defendant cannot be said to have engaged in conduct

"unreasonably restrictive" of competition for purposes of Section 2.

Abbott's motion for summary judgment on the patent-related Section 2 claims is denied. Innotron's evidence that Abbott misrepresented the true purpose of its claimed invention to the PTO amounts to the following: (1) Abbott's researchers were aware that SDS both reduced background fluorescence and reduced non-specific binding, and in fact researched the latter effect first; (2) Abbott was aware of prior art with respect to non-specific binding; and (3) the TDx already had the capacity to account for background fluorescence. Though a close call in light of the need to establish intentional misrepresentation by clear and convincing evidence, it appears that questions of fact exist precluding summary judgment on this issue.

Questions of fact also exist concerning Abbott's knowledge of and failure to disclose the Kobayashi paper. Innotron has established that the paper was in the possession of both Dr. Stroupe and James Wilcox. Both deny having read it. In light of the totality of the circumstances, this credibility question cannot be resolved on summary judgment. KangaRoos U.S.A., Inc. v. Caldor, Inc., 778 F.2d 1571, 1576 (Fed. Cir. 1985). Finally failure to disclose the TDx's capacity to subtract background fluorescence does not appear to violate the "best mode" rule of 35 U.S.C. Sec. 112.

For all the above reasons, defendant's motion is GRANTED with respect to plaintiff's tying claims under Section 1 and Section 2 of the Sherman Act. The motion is DENIED with respect to plaintiff's patent-related Section 2 claims. Because this ruling renders plaintiff's motion for partial summary judgment moot, the Court declines to rule on that motion.

Dated: August 1, 1988

WILLIAM J. REA
UNITED STATES DISTRICT
JUDGE

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOTRON DIAGNOSTICS,
Plaintiff-Appellant,

vs.

ABBOTT LABORATORIES,
Defendant-Appellee.

NO. CA-88-6511
D.C. # CV-85-2207-WJR

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APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA

_____

_____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

A TRUE COPY
ATTEST
CATHY A. CATTERSON
Clerk of Court
by: Ernesto M. Cruz
Ernesto M. Cruz
Deputy Clerk

LODGED
JAN 5 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

Filed and entered 12/15/89

APPENDIX C

PROOF OF SERVICE LIST

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 13, 1990, I served the within *Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, by Express Mail, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, United States Court
of Appeals
Ninth Judicial Circuit
7th & Mission Streets
San Francisco, CA 94101

Jeffrey I. Weinberger, Esq.
Steven M. Perry, Esq.
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Munger, Tolles & Olson
355 South Grand Avenue
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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 13, 1990, at Los Angeles, California.

Betty J. Malloy
(Original signed)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1441

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

INNOTRON DIAGNOSTICS,
Petitioner,
v.
ABBOTT LABORATORIES,
Respondent.

OPPOSITION TO PETITION OF INNOTRON DIAGNOSTICS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPPOSITION TO PETITION OF INNOTRON DIAGNOSTICS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Abbott Laboratories ("Abbott") respectively submits this brief in opposition to the petition of Innotron Diagnostics ("Innotron") for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.[1]

[1]Pursuant to Rule 28.1, Abbott certifies that Abbott does not have parent companies, subsidiaries that are not wholly owned, or affiliates.

I.

INTRODUCTION

In a memorandum opinion filed on December 15, 1989, the Ninth Circuit affirmed the district court's partial summary judgment dismissing Innotron's Sherman Act antitrust claims against Abbott. The Ninth Circuit correctly held that Innotron had failed to produce enough evidence to create a genuine issue of material fact on its Section 1 tying claim and its Section 2 monopolization claim. The decision was, in all respects, a routine application of Rule 56 of the *Federal Rules of Civil Procedure* to antitrust cases. Innotron's arguments that this case presents three questions appropriate for review by this Court are based on mischaracterizations of the opinion of the Ninth Circuit and on misperceptions of the law of summary judgment. No conflict among the circuits exists with respect to the issues identified by Innotron, nor are there any other special and important reasons to grant this writ of certiorari.

First, contrary to Innotron's contentions, the Ninth Circuit did not hold that "no claim of monopolization can be predicated on 'tying' conduct which escapes *per se* condemnation." Petition at 12. Rather, the Court affirmed summary judgment on Innotron's Section 2 claims because Innotron did not even attempt to provide significant probative evidence that Abbott's conduct was predatory or anticompetitive in any respect beyond the allegations of a tying arrangement.

Second, while Innotron contends that the lower courts erred in refusing to consider whether the tying arrangement at issue could violate Section 1 of the Sherman Act under a rule of reason analysis, Innotron did not even raise a rule of reason claim in the district court. Under

the law of summary judgment, as announced by this Court and consistently applied in all of the circuits, once a moving party has filed its properly supported motion, it is the responsibility of the responding party to come forward with substantial probative evidence showing that it has a claim. Innotron failed to make such a showing, whether under a Section 1 *per se* theory or the rule of reason.

Third, Innotron claims that the Ninth Circuit improperly chose between what that Court "admitted" were reasonable competing inferences as to the evidence. Innotron asserts that review by this Court is warranted because this "weighing of competing inferences as an appropriate standard for summary judgment" constitutes authorization for "abolition of the jury system." Petition at 17. But the express language of the Ninth Circuit's opinion tells a very different tale. Far from finding that the inferences urged by Innotron were reasonable, the Court of Appeals held that "for a jury to find in Innotron's favor, it would have to draw *inferences* . . . which are *unreasonable* given the lack of supporting evidence." Petition at A4 (emphasis added).)[2] As this Court has stated, in order to defeat summary judgment "there must be evidence on which the jury could *reasonably* find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986) (emphasis added). The Ninth Circuit's decision in this case is a correct and unexceptional application of that principle.

In sum, Innotron has failed to present any issues appropriate for review by this Court. Accordingly, the petition for writ of certiorari should be denied.

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[2]The Ninth Circuit's memorandum is attached to Innotron's petition as Appendix A.

II.

STATEMENT OF THE CASE

A. Statement of Facts.[3]

Among Abbott's many health care products are therapeutic drug monitoring tests ("tdm reagents") that measure the level of prescription drugs in a blood sample. In the fall of 1981, Abbott launched a new diagnostic instrument called the TDx. In conjunction with tdm reagents specific to the particular drugs being measured, the TDx monitors the amount of drug in a patient's blood. Petition at B2.

By 1984 Innotron had developed and had begun to market reagents to be used specifically and only with the Abbott TDx. In August 1986, however, Innotron filed for bankruptcy and sold its reagent product line to a competitor, retaining this lawsuit as its principal asset. *Id.*

1. Abbott's TDx Marketing Practices

a. TDx Placement Options

At all times relevant to this case, Abbott has offered to its customers three principal means by which to obtain a TDx analyzer: outright sale, third party lease or reagent agreement plan ("RAP"). Under the sale option, a hospital or laboratory pays a lump sum to Abbott and acquires possession of and title to the TDx analyzer. Under the leasing option, the customer wishing to acquire a TDx negotiates a lease with a third party leasing company.

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[3] Unless otherwise noted, the facts set forth are among those established by Abbott in support of its motion for summary judgment that were either admitted or uncontroverted. Citations are to the District Court's Order on Motion for Summary Judgement, included in the Petition as Appendix B.

Abbott receives a lump sum for the analyzer from the leasing company, which acquires title to the equipment. Petition at B3.

Customers who acquire the TDx under either the sale or lease options have no contractual obligation to purchase any reagents for use on the instrument from Abbott, but are free to use any reagents, from any available source, without seeking approval from Abbott. *Id.*

Under a RAP, by contrast, Abbott retains title to the TDx analyzer, although the customer is free to buy the instrument at any time. In essence, the customer is permitted to use the TDx without a separate charge as long as it agrees to buy a specified minimum quantity of reagents and to use only Abbott reagents with the TDx. *Id.*

All Abbott customers are provided the choice of acquiring a TDx by purchase, lease, or under a RAP contract. Abbott has attempted to promote TDx purchase and lease through special programs. Nevertheless, the RAP placement has proven to be the most popular option offered by Abbott, and the percentage of TDx customers choosing purchase or lease has declined. Innotron concedes that various marketplace factors have contributed to the decline in the percentage of TDx users who own or lease their instruments. *Id.*

Abbott does not control the use by TDx owners or lessees of non-Abbott reagents. However, a customer who obtains the use of a TDx on a RAP obligates itself to use only Abbott reagents with the TDx. *Id.*

b. TDx Service Plans

TDx purchasers receive a three month warranty on the instrument from Abbott. After the warranty expires, a

TDx owner may choose between at least the following three basic service options: (1) a "time and materials" plan, with payment based on actual labor and parts needed; (2) an annual service contract; and (3) a self service plan, consisting of spare parts for the TDx instrument, a cabinet, automatic resupply of the parts as they are used, and instructions. Petition at B4.

The TDx owner may obtain any of the above service plans free of any obligation to use only Abbott reagents. The self service plan is available to TDx owners and RAP customers on a purchase basis, without such contractual restriction. It is also available free of surcharge to high volume TDx users who commit to purchase most of their test volume from Abbott. *Id.*

B. The Proceedings Below.

Innotron filed its antitrust complaint against Abbott on April 1, 1985. Innotron contended, *inter alia*, that Abbott had "tied" the availability of the TDx instrument to the purchase of Abbott reagents in violation of Section 1 of the Sherman Act. Innotron also claimed that Abbott had committed an independent violation of Section 1 by revising the software used in the TDx instrument to "lock out" competitive reagents.[4] Innotron further asserted that this alleged tying arrangement formed a basis for its Section 2 monopolization and attempted monopolization claims against Abbott.

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[4] Innotron subsequently abandoned its software modification claims in the face of Abbott's summary judgment motion showing that the changes improved both the performance and the reliability of the TDx instrument. These claims were formally dismissed pursuant to the district court's partial judgment under Rule 54(b), and issues related to this purported "technological tie" were not before the Ninth Circuit.

Abbott then brought a separate patent infringement action against Innotron to enforce a patent related to the technology of the TDx. Innotron subsequently amended its Section 2 claims to allege that Abbott had fraudulently procured its patent and had filed its infringement suit in bad faith.

After the close of three years of discovery, Abbott moved for summary judgment on all of Innotron's antitrust claims. In its motion papers, Abbott contended that no illegal tie-in existed between the TDx and Abbott tdm reagents because customers were at all times free to purchase the TDx from Abbott, without any restriction on the use of competitive reagents. Because Innotron had made no allegations of anticompetitive conduct other than its claims that Abbott's contractual restrictions and software modifications constituted tying arrangements in violation of Section 1, Abbott contended that a determination adverse to Innotron on these claims would be fatal to its non-patent-related claims under Section 2 as well. Finally, Abbott argued that summary judgment was appropriate with respect to Innotron's patent-related Section 2 claims.

The district court granted Abbott's motion with respect to Innotron's tying-related claims under Sections 1 and 2 of the Sherman Act. The court held that where the products in question are genuinely available on a separate basis, a tying arrangement has not been demonstrated, unless purchase of the package is coerced by pricing differentials or by other means. Petition at B6. It was undisputed that Abbott offered the TDx without the condition that Abbott reagents be purchased with it, and the district court found that Innotron had failed to meet its burden of introducing significant probative evidence that a tying arrangement was coerced by either price

differentials or other marketing tactics. Petition at B7 and B11. Finally, the court rejected as unsupported by the evidence Innotron's argument that Abbott had used service plans to tie TDx owners to the use of Abbott reagents. Petition at B11. With respect to Innotron's Section 2 claim, the court found that because Innotron's non-patent-related Section 2 claims rested upon the same allegations of coercive conduct found to be without support under Section 1, summary judgment was proper. Petition at B13.

On appeal, the Ninth Circuit affirmed the district court's judgment on all grounds.

III.

ARGUMENT

A. The Ninth Circuit's Decision In This Case Does Not Create a Conflict in The Circuits as to Whether a Monopolization Claim Can Exist Based on Conduct Which is Not *Per Se* Tying.

In urging that this Court review the decisions of the courts below on Innotron's Section 2 claims, Innotron does *not* argue that Innotron presented enough evidence in opposition to the motion for summary judgment to create a genuine issue of material fact with regard to those claims. Rather, Innotron attempts to identify a question for review by this Court by claiming erroneously that the "essence" of the Ninth Circuit's opinion in this case is that "no claim of monopolization can be predicated on 'tying' conduct which escapes *per se* condemnation under Section 1 of the Sherman Act." Petition at 12. Innotron further contends that this supposed holding creates an "important issue of substantive antitrust law"

as to which there is disagreement among the circuits. *Id.* at 13.

Despite Innotron's contentions, neither the Ninth Circuit nor the district court in this case stated or implied that summary judgment was appropriate "merely because the [alleged] 'tying' conduct may not be a per se Section 1 violation." To the contrary, the courts below simply applied the well-established principle that in order for a plaintiff to prove a violation of Section 2, it must, among other elements, establish that the defendant has engaged in anticompetitive conduct designed either to obtain or preserve monopoly power in a relevant market. *See,* e.g., *United States v. Grinnel Corp.,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); *Forro Precision, Inc. v. IBM Corp.* 673 F.2d 1045, 1058 (9th Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 273-275 (2d Cir. 1979).

In assessing Innotron's Section 2 claim, the lower courts first determined that Innotron relied solely on its tying allegations to satisfy the predatory or anticompetitive conduct element of a Section 2 violation. As the Ninth Circuit held,

> "the conduct that Innotron relies on to satisfy the unreasonable restriction of competition element of a monopolization claim or the anticompetitive element of an attempted monopolization claim is *precisely the same conduct* that Innotron relied on in its tying claim . . . *Nowhere in its opening or reply brief does Innotron highlight conduct separate and distinct from its tying claim to support its Section 2 claim.*"

Mem. Op. at 4-5 (emphasis added).

Since Innotron's allegations related to the conduct element of its Section 2 claim were identical to its tying

allegations, the question before the lower courts was whether the tying conduct alleged was anticompetitive or predatory. Innotron did not offer any evidence that this was the case which was different from or additional to its claims under the Section 1 tying theory. Accordingly, the court properly held that Innotron had failed to provide any evidence of anticompetitive conduct to support its Section 2 claim, and that summary judgment was appropriate.

This holding is wholly consistent with the holdings in the three other Ninth Circuit decisions cited by Innotron. For example, in *Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) ("Foremost"), the Ninth Circuit rejected plaintiff's contention that defendant's introduction of technologically related products incompatible with the products offered by competitors constituted a tying arrangement in violation of Section 1. In a passage cited by the Ninth Circuit in the instant case, the Court in *Foremost* then held that

> "*[b]ecause the conduct Foremost alleges in support of its Section 1 tying claim is not anticompetitive*, it is of no assistance to Foremost's efforts to state a claim for relief for monopolization or attempted monopolization, both of which require at least some allegation of anticompetitive conduct."

Id. at 543 (emphasis added).

Similarly, in *Mozart Co. v. Mercedes-Benz of North American, Inc.*, 833 F.2d 1342 (9th Cir. 1987), the only conduct that plaintiff alleged satisfied the anticompetitive or predatory conduct element of the Section 2 claim was the same conduct plaintiff had relied on to support its Section 1 tying claims. The court found that the alleged tying arrangement "cannot be characterized as the type of

predatory anticompetitive, or unfair conduct that is necessary to support a Sherman Act Section 2 claim." *Id.* In *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985), the Ninth Circuit relied on the reasoning of the *Foremost* opinion to hold that where a plaintiff had failed to prove in the context of its Section 1 claims that an alleged tying arrangement constituted anticompetitive conduct, it could not rely on that arrangement alone to satisfy the predatory or anticompetitive conduct element of a claim under Section 2. *Id.* at 1184.

The Ninth Circuit's holding is also consistent with the law in other circuits. In each of the cases cited by Innotron, unlike the situation presented here, the plaintiff relied on allegations and evidence different from and in addition to its tying allegations to support a Section 2 claim. Indeed, the district court in the instant case properly distinguished *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1987), on precisely the ground that the plaintiff's allegations in support of its Section 2 claim were not identical to its tying allegations:

> "The bundled pricing program at issue in *SmithKline* did not leverage economic power to bind customers to particular products and so did not present a coercion problem under Section 1. Monopoly power was leveraged, however, to provide cumulative discounts which precluded effective competition in another market. This presented an independent antitrust problem cognizable under Section 2. In this case, Innotron's allegations under both sections are confined to the use of economic power to coerce tied purchases. Such coercion having been found lacking, defendant cannot be said to have engaged in conduct

> 'unreasonably restrictive' of competition for purposes of Section 2."

Petition at B13-14.

Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701 (7th Cir.), *cert. denied*, 439 U.S. 822 (1978), is similarly inapposite. In that case, as in *SmithKline*, the plaintiff alleged not only an illegal tying agreement but also that the defendant had leveraged its monopoly power in the market for one product to gain an unfair competitive advantage in the market for another product. *Id.* at 713. *See also Berkey Photo*, 603 F.2d at 276 (discussing *Sargent-Welch* as example of a monopoly leveraging case).[5]

In sum, the lower courts found that summary judgment on Innotron's Section 2 claim was proper because Innotron failed to present enough evidence of anticompetitive conduct to create a genuine issue of material fact, and *not* because of the application of some general rule unique to the Ninth Circuit. There is no conflict in the circuits created by the Ninth Circuit's summary dismissal of Innotron's Section 2 claim; nor is there any question appropriate for review by this Court.

B. The Court of Appeals and The District Court Properly Refused to Consider a "Rule of Reason" Analysis.

As Abbott explained below, Abbott's motion for summary judgment expressly sought dismissal of *all* of Inno-

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[5]On appeal to the Ninth Circuit, Innotron for the first time in this litigation asserted a so-called monopoly leveraging claim. The Ninth Circuit declined to address this issue, on the ground that it was not raised in the district court, Mem. Op. at 5, n. 2. Innotron does not challenge this aspect of the Ninth Circuit's decision.

tron's antitrust claims including all claims under Section 1 of the Sherman Act, on the ground that Innotron could not demonstrate the existence of genuine issues of material fact with respect to those claims. Abbott characterized Innotron's tying arrangement claims as allegations of *per se* violations of Section 1. In its papers opposing summary judgment, Innotron did not dispute this characterization. Moreover, Innotron conceded before the Ninth Circuit that it *nowhere* argued that it should be permitted to proceed to trial on a rule of reason claim if its *per se* claim was dismissed.

In its petition, Innotron does not argue that it raised the rule of reason issue below. Nor does Innotron dispute that courts of appeal will generally not consider issues raised for the first time on appeal, *see* e.g., *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1477 (9th Cir. 1989), or that this general rule is fully applicable to an attempt to create a purportedly genuine issue of material fact on appeal from a summary judgment. *See Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 812 (9th Cir. 1982).

Rather, Innotron claims that it should be excused from raising the rule of reason below simply because Abbott's moving papers did not expressly mention that particular theory of liability under Section 1. In essence, Innotron argues that the party moving for summary judgment somehow bears the burden of anticipating and negating all possible contentions and evidence that might be presented in opposition to the motion. This argument is utterly without merit.

Pursuant to Rule 56 of the *Federal Rules of Civil Procedure*, Abbott moved for summary judgment on Innotron's entire claim under Section 1 of the Sherman Act. It is well established that once a party meets its initial

burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, *see, Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986), the non-movant is required to set forth "specific facts showing that there is a genuine issue for trial." Rule 56(e). Here, Abbott met its initial burden as to Innotron's Section 1 claim. At that point, the burden properly shifted to Innotron to present admissible evidence showing that it had a Section 1 claim. If Innotron's Section 1 claim for relief included allegations related to a rule of reason claim, Innotron was obligated to present substantial probative evidence to support such a claim in opposition to the motion. Since Innotron failed to present such evidence, Innotron cannot now complain.

The authority cited by Innotron does not support Innotron's misreading of the law of summary judgment. Indeed, the lengthy quotation offered by Innotron from this Court's opinion in *Celotex* plainly stands only for the noncontroversial point that the party seeking summary judgment has the initial responsibility of informing the court of the basis of its motion.[6]

---

[6]The Tenth Circuit opinion in *Monument Builders v. American Cemetery Association*, 891 F.2d 1473 (10th Cir. 1989), is irrelevant to the issues raised by Innotron. In that case, the issue was not the proper standard for summary judgment, but whether the allegations of a complaint were sufficient to state a claim under *Federal Rule of Civil Procedure* 12(b)(6).

C. The Ninth Circuit Properly Granted Summary Judgment On Innotron's Tying Claim On The Ground That There Were No Genuine Issues of Material Facts For Trial.

Innotron contends that the Ninth Circuit improperly chose between what the Ninth Circuit supposedly admitted were "reasonable" competing inferences. Innotron states that if this Court does not reach out to review the Ninth Circuit's opinion it will have done nothing less than "authorize abolition of the jury system." Petition at 17.

Innotron has created this argument out of whole cloth. Despite Innotron's claims, the Ninth Circuit never "admits," "concedes" or "acknowledges" that any possible inferences supporting Innotron's position are "reasonable." To the contrary, after first noting that "only inferences from two pieces of evidence . . . support Innotron's position at all," the Ninth Circuit flatly and unequivocally holds that those inferences are *"unreasonable."* The Court states, after examining the entire record, that

> "for a jury to find in Innotron's favor, *it would have to draw inferences from the price increases and the placement decline which are unreasonable* given the lack of supporting evidence."

Petition at A4 (emphasis added).

The plain language of the Ninth Circuit's opinion thus makes clear that there is no merit to Innotron's charge that the Ninth Circuit improperly weighed competing inferences. Instead, the Court of Appeals correctly followed the well-established principle that a court must grant a motion for summary judgment unless it determines that the non-moving party has provided "evidence on which the jury could *reasonably* find for the plaintiff." *Liberty Lobby*, 477 U.S. at 252. In discussing possible

inferences from the evidence, the Ninth Circuit merely performed the proper and necessary inquiry as to where there was any substantial evidence in the record to support Innotron's claims. After completing this inquiry, the Court concluded that there was no evidence on which jurors could find for Innotron. This decision neither "implicitly repudiates the jury system" nor presents an appropriate question for review by this Court. Rather it is a routine application of well settled law under Rule 56 of the *Federal Rules of Civil Procedure*.

IV.

CONCLUSION

For all the foregoing reasons, respondent Abbott Laboratories submits that this Court should deny Innotron's petition for a writ of certiorari.

DATED: April 16, 1990

Respectfully submitted,

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I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 16, 1990, I served the within opposition to Petition of Innotron Diagnostics for a Writ of Certiorari in re: "Innotron Diagnostics vs. Abbott Laboratories" in the United States Supreme Court, October Term 1989 No. 89-1441, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 1990, at Los Angeles, California.

Ce Ce Medina

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I

THE NINTH CIRCUIT'S LINE OF DECISIONS HOLDING THAT NO CLAIM FOR MONOPOLIZATION CAN BE STATED UNDER SECTION 2 IF BASED ON "TYING CONDUCT" WHICH IS NOT PER SE VIOLATIVE UNDER SECTION 1 OF THE SHERMAN ACT CREATES A CONFLICT AMONG THE CIRCUITS

Contrary to Respondent's contention, the Ninth Circuit's decision that no claim can be stated for monopolization under § 2 if the conduct does not rise to the level of coercion required for per se unlawful

tying arrangements under § 1 cannot be reconciled with decisions of the Third and Seventh Circuits. Respondent's effort to distinguish the Third Circuit's decision in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978), and the Seventh Circuit's decision in *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir.), *cert. denied*, 439 U.S. 822 (1978), lacks any analytical foundation.

Respondent states that the decisions of the Third and Seventh Circuits found § 2 violations based on monopoly leveraging, which it argues is conduct distinct from tying. But tying is simply a form of monopoly leveraging. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The only difference between tying and leveraging is the coercion element. To qualify as per se unlawful tying under § 1, the defendant must use a degree of market power in the tying product to coerce customers in the downstream, tied product market. In contrast, monopoly leveraging under § 2 requires only that the defendant use monopoly power in one market in a way that is unreasonably restrictive of competition in the second market. Therefore, conduct that does not rise to the level of coercion required for tying under § 1 may nevertheless constitute leveraging under § 2. Respondent's (and the Ninth Circuit's) suggestion that "tying" allegations cannot also constitute a leveraging offense is simply incorrect.

Nor is Innotron required to prove monopoly leveraging in order to establish an offense under § 2. In this case, Abbott inserted a prohibition on the use of competitors' reagents in its TDx machine rental contracts for the purpose of maintaining its monopoly

in the reagent market. This violates § 2 irrespective of whether it also constitutes monopoly leveraging. Abbott moved for summary judgment on this § 2 claim based solely on its argument that monopolization requires the same showing of coercion as that required for per se tying arrangements. The Ninth Circuit's acceptance of this argument squarely conflicts with the Third Circuit's decision in *SmithKline*. In *SmithKline*, the court held that while the defendant's pricing scheme was not coercive and did not constitute a tie, it nonetheless was unreasonably restrictive of competition in the market in violation of § 2.

This difference in the degree of exclusionary conduct required for tying under § 1 and monopolization under § 2 is well founded. Once coercion and the other requisite elements of per se unlawful tying are established, anticompetitive effect is presumed and the defendant has only limited defenses. Section 2, by contrast, requires a complete analysis of the pro- and anticompetitive effects of the conduct at issue. The Third and Seventh Circuits have recognized this qualitative distinction and have held that a plaintiff who cannot meet the more stringent coercion standard for per se unlawful conduct under § 1 may prevail by showing an unreasonable restriction of competition under § 2. The Ninth Circuit, as exemplified by the decision below, has stubbornly refused to recognize any distinction between § 1 and § 2. This Court should grant Innotron's petition for certiorari to reconcile this conflict.

II

NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT RULED THAT THE PETITIONER COULD NOT WIN A TIE-IN CLAIM TRIED UNDER THE RULE OF REASON

Here, respondent does a polite curtsy and seeks to "palm off" on petitioner what is, in truth, its burden. In making a motion for summary judgment, the obligation is on the moving party to "demonstrate the absence of a genuine issue of material fact." *Celotex Corporation v. Catrett,* 477 U.S. 317, 323 (1986). As Justice White stated even more pointedly in his concurring opinion in that case "[i]t is the defendant's task to negate, if he can, the claimed basis for the suit." *Id.* at 327. Now defendant suggests that it was Petitioner's obligation to *create* a genuine issue of material fact. Wrong! If, in fact, Abbott moved for summary judgment on Innotron's *entire* claim, but did so only on the basis that the coercion element, applicable to the *per se* analysis, was absent, then it failed to meet its burden of proving the absence of a genuine issue of material fact, namely, whether the express prohibition on buying competitive reagents was unreasonably anticompetitive under a rule of reason test. Clearly, Innotron, by laying out the totality of the factual basis of its case, satisfied the *Celotex* requirement of setting forth "specific facts showing that there is a genuine issue for trial" under a Section 1 rule of reason analysis. *Id.* at 324. It is Abbott, therefore, who failed to satisfy its burden.

The uncertainty in allocating the burden of proof with respect to negating or establishing a material issue of

fact is itself an issue warranting clarification by this Court.

III

THIS COURT SHOULD CLARIFY THAT SUMMARY JUDGMENT CANNOT BE GRANTED WHERE THE TOTALITY OF THE FACTS PERMITS REASONABLE COMPETING INFERENCES

Respondents do not respond to our argument that the Ninth Circuit decision has ignored this Court's admonition in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that the resolution of competing factual inferences is appropriately left to the trier of fact. Respondent's argument that the Ninth Circuit found that an inference of coercion from the totality of facts would be "unreasonable" misses the point. What the Ninth Circuit said was ". . . two pieces of evidence are susceptible to inferences *besides* coercion . . . price increases *could* . . . be a legitimate attempt to maximize profits in the tying product market . . . and the decline in placements *could* have reflected saturation in the large hospital market." (Appendix A to Petition at 2) (emphasis added.) In short, the Ninth Circuit found the facts did permit an inference of coercion, but that other inferences could also be drawn.

This Court needs, we respectfully submit, to define, what an "unreasonable" inference is. An unreasonable inference is one which is not permissible in the first instance, *e.g.*, facts A, B and C taken together do not permit the reasonable inference that fact D occurred. That is *not* what the Ninth Circuit ruled. It acknowledged that the evidence permitted an inference of coercion. The panel held only that it found the innocent inferences more persuasive.

What the Ninth Circuit did, under the *guise* of declaring the inference of coercion to be unreasonable, was weigh the evidence and come to a conclusion as to what *it* believed to be the better or more appropriate inference. That weighing process is impermissible and beyond the scope of summary judgment. This is particularly true where, as here, the inferences of coercion were supported by direct testimony from the defendant's own employees and customers. The Ninth Circuit flagrantly abused the summary judgment process, and it exhibited an indifference toward this Court's cautionary admonition in *Anderson v. Liberty Lobby*. Such excesses are becoming all too commonplace. We urge this court to exhort lower Courts to avoid acting as juries.

CONCLUSION

The Ninth Circuit's decision reflects the lengths to which the standards for granting summary judgment may be abused. We urge this Court to grant review and, in addition to resolving a circuit conflict on a significant substantive antitrust issue, to clarify, with emphasis, its concern for the well being of the jury system and

particularly its concern that important, factually based antitrust cases should not be routinely disposed of summarily.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 30, 1990, I served the within *Reply Brief in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, United States Court
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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 30, 1990, at Los Angeles, California.

Betty J. Malloy
(Original signed)